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Supreme Court, U.S.
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No. 94-1838

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

OXY USA INC,

Petitioner,

V.

CONTINENTAL TREND RESOURCES, INC., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents disagree that the questions framed by Petitioner are presented by the record before this Court. Respondents have identified the deficiencies in the text of this Brief.

LIST OF PARTIES

There are no parent or subsidiary companies to be listed.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 1

A. EVIDENCE AT TRIAL 2

B. JURY VERDICT AND POST-TRIAL PROCEEDINGS 4

REASONS FOR DENYING THE WRIT 5

A. REASON ONE - OXY FAILED TO PRESENT AND PRESERVE QUESTIONS 1 AND 2 5

1. OXY Failed To Preserve The Issue Presented On The Tenth Circuit's "Shock The Judicial Conscience" Standard Of Review 5

2. OXY Failed To Raise Any Issue Concerning A Conflict Among The Circuits Or That The Tenth Circuit Applied The Wrong Standards 6

3. OXY Also Failed To Preserve Any Question Concerning Its Financial Condition 6

4. Summary 7

B. REASON TWO - THE DECISION IS PLAINLY CORRECT 7

C. REASON THREE - THERE IS NO CONFLICT AMONG THE CIRCUITS . . . 8

D. REASON FOUR - THIS COURT SHOULD DENY THE PETITION NOW - - THERE IS NO REASON TO WAIT FOR THE DECISION IN BMW 9

E. REASON FIVE - THIS CASE IS NOT ONE OF EXCEPTIONAL IMPORTANCE NOR DOES IT CONTAIN ISSUES LIKELY TO RECUR 11

ARGUMENT 12

I. THE COURT OF APPEALS CORRECTLY APPLIED THE FACTORS OXY ASKED IT TO APPLY AND SUCH APPLICATION PRESENTS NO CONFLICT AMONG THE CIRCUITS . . . 12

A. THE REVIEW PROCESS IS WORKING 13

B. THERE IS NO CONFLICT AMONG THE COURTS OF APPEAL ON THE STANDARD OF REVIEW OR THE FACTORS TO BE APPLIED 15

II. OXY HAS WAIVED ANY REVIEW CONCERNING ITS FINANCIAL CONDITION; IN ANY EVENT, THE PUNITIVE DAMAGES AWARD IS NOT EXCESSIVE AND WILL NOT BE AFFECTED BY THE RESULT IN BMW 22

A. OXY FAILED TO PRESERVE ANY ISSUE CONCERNING FINANCIAL CONDITION 23

B. OBJECTIVE FACTORS DEMONSTRATE THAT THE PUNITIVE DAMAGES WERE REASONABLE 23

III. WHATEVER THIS COURT MAY HOLD IN BMW, IT WOULD NOT AFFECT THIS DECISION 30

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases:

AJ & AJ Servicing, Inc. v. Tudor Assoc., Ltd., II, 63 USLW 3817 (U.S. May 15, 1995) (No. 94-1380) 9

Ballew v. Georgia, 435 U.S. 223 (1978) 4

Bankers Life & Casualty Co. v. Crenshaw, 483 So.2d 254 (Miss. 1985), *aff'd*, 486 U.S. 71 (1988) 29

Berj Boyajian v. Olfacto-Labs, 63 USLW 3756 (U.S. May 30, 1995) (No. 94-1636) 9

BMW of North America, Inc. v. Gore, 115 S.Ct. 932 (1995) 5, 9, 10, 12, 30

Boyle v. Lorimar Productions, Inc., 13 F.3d 1357 (9th Cir. 1994) 13

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 19

Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 1063 (1994) 13

Cash v. Beltmann North American Co., Inc., 900 F.2d 109 (7th Cir. 1990) 29

Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) 22

Chemstar, Inc. v. Liberty Mutual Ins. Co., 42 F.3d 1398, 1994 WL 650018 (9th Cir. 1994), *petition for cert. filed*, 63 USLW 3599 (U.S. Feb. 6, 1995) 19

Colgrove v. Battin, 413 U.S. 149 (1973) 19

DeRance, Inc. v. PaineWebber, Inc., 872 F.2d 1312 (7th Cir. 1989) 18

Dow Corning Corp. v. Hopkins, 115 S.Ct. 734 (1995) (No. 94-861) 9

Duck Head Apparel Co., Inc. v. Hoots, __ So.2d __, 1995 WL 64270 (Ala. Feb. 17, 1995) 12

Dunn v. HOVIC, 1 F.3d 1371 (3rd Cir.), *modified in part*, 13 F.3d 58 (3rd Cir.), *cert. denied*, 114 S.Ct. 650 (1993) 7, 14, 18

Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377 (5th Cir. 1991) 19

Equal Employment Opportunity Comm'n v. Federal Labor Relations Auth., 476 U.S. 19 (1986) 7

Europlast, Ltd. v. Oak Switch Sys., 10 F.3d 1266 (7th Cir. 1993) 19

Federal Deposit Ins. Corp. v. W.R. Grace & Co., 691 F.Supp. 87 (N.D. Ill. 1988), *aff'd in part and rev'd in part*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990) 22

Ferrellgas, Inc. v. Clay, 115 S.Ct. 1102 (1995) (No. 94-1066) 9

Figgie v. Moskovitz, 115 S.Ct. 668 (1994) (No. 94-781) 10

General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175 (1938) 8

Glasscock v. Armstrong Cork Co., 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, 503 U.S. 1011 (1992) 19

Gregory v. Ashcroft, 501 U.S. 452 (1991) 11

Hanson v. Parkside Surgery Center, 872 F.2d 745 (6th Cir.), *cert. denied*, 493 U.S. 944 (1989) 4

Honda Motor Co., Ltd. v. Oberg, 114 S.Ct. 2331 (1994) 1, 9, 11, 13, 15, 16

Hopkins v. Dow Corning Corp., 33 F.3d 1116 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 734 (1995) 19

In re Air Crash Disaster Near New Orleans, La., 767 F.2d 1151 (5th Cir. 1985) 20, 21

Jackson v. Virginia, 443 U.S. 307 (1979) 16

Jacobs Mfg. Co. v. Sam Brown Co., 19 F.3d 1259 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1251 (1995) 19

Jacobs Mfg. Co. v. Sam Brown Co., 115 S.Ct. 487 (1995) (No. 94-653) and 115 S.Ct. 1251 (1995 (No. 94-989) 10

Jeffries v. Harleston, 21 F.3d 1238 (2nd Cir. 1994) 13

John A. Henry & Co., Ltd. v. T.G.& Y. Stores Co., 941 F.2d 1068 (10th Cir. 1991) 26

Johnson v. Hugo's Skateway, 974 F.2d 1408 (4th Cir. 1992) 18

Keenan v. City of Philadelphia, 983 F.2d 459 (3rd Cir. 1992) 19

King v. Macri, 993 F.2d 294 (2nd Cir. 1993) 19

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 9

Louisiana-Pacific Corp. v. Orjias, 115 S.Ct. 511 (1994) (No. 94-536) 10

M. Harold Ezzone v. Willis M. Hansen, 63 USLW 3817 (U.S. May 15, 1995) (No. 94-1513) 9

Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) 18, 19

Minneapolis St. P. & S. S. M. Ry. Co. v. Moquin, 283 U.S. 520 (1931) 2

Morgan v. Woessner, 997 F.2d 1244 (9th Cir. 1993), *cert. dismissed*, 114 S.Ct. 671 (1994) 9, 17, 18

Moskovitz v. Mt. Sinai Med. Ctr., 635 N.E.2d 331 (Ohio 1994), *cert. denied*, 115 S.Ct. 668 (1994) 3, 29

Overbeck v. Quaker Life Ins. Co., 757 P.2d 846 (Okl. Ct. App. 1984) 26

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 1, 5, 6, 9, 11, 16-20, 23, 25

Pacific Mut. Life Ins. Co. v. Haslip, 553 So.2d 537 (Ala. 1989) 20

Professional Seminar Consultants, Inc. v. Sino Am. Tech. Exch. Council, Inc., 727 F.2d 1470 (9th Cir. 1984) 29

Robertson Oil Co., Inc. v. Phillips Petroleum Co., 14 F.3d 373 (8th Cir. 1993) (*en banc*), *cert. denied*, 114 S.Ct. 2120 (1994) 19

Swanson v. Schlumberger Tech. Corp., 895 S.W.2d 719 (Tex. Civ. App. 1994, *writ requested*) 22

Texaco Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. Ct. App. 1987, *writ ref'd n.r.e.*), *cert. dismissed*, 485 U.S. 994 (1988) 22

Tudor Assoc., Ltd., II v. AJ & AJ Servicing, Inc., 36 F.3d 1094, 1994 WL 510456 (4th Cir. 1994), *cert. denied*, 63 USLW 3812, 63 USLW 3817 (May 15, 1995) 18

TXO Production Corp. v. Alliance Resources Corp., 113 S.Ct. 2711 (1993) 1, 2, 8-11, 13, 19, 20, 22, 23, 25, 28

United States v. Alvarez-Sanchez, 114 S.Ct. 1599 (1994) 7

Vasbinder v. Scott, 976 F.2d 118 (2nd Cir. 1992) 19

Winant v. Bostic, 5 F.3d 767 (4th Cir. 1993) 19

Wisconsin Electric Co. v. Dumore Co., 282 U.S. 813 (1931) 9

Statutes:

18 U.S.C. Appx. § 8, *et seq.* 16

Okla. Stat. tit. 23, § 9 (1991) 4, 22

Okla. Stat. tit. 76, § 1 (1991) 26

Rules:

Sup.Ct.R. 15.1 2

Fed.R.Civ.P. 50 9

Fed.R.Civ.P. 59 . . . . . 9, 19, 21

Other Authorities:

Restatement (Second) of Torts § 908(2) (1979) 18

Annot., *Punitive Damages: Relationship To Defendant's Wealth As Factor In Determining Propriety Of Award*, 87 A.L.R.4th 141 (1991) 30

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Petitioner OXY USA Inc. ("OXY") has not properly preserved the errors raised in its Petition for Writ of Certiorari ("Petition"). More fundamentally, OXY's Petition is substantively without merit. It should be denied for many of the reasons this Court typically gives for refusing to exercise its extraordinary and discretionary jurisdiction: (1) the questions presented by the Petition were not raised and/or were waived in the proceedings below; (2) the decision below is plainly correct and the right result was reached; (3) the decision below gave full consideration to this Court's decisions in *Honda Motor Co., Ltd. v. Oberg*, 114 S.Ct. 2331 (1994) ("*Honda*"), *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993) ("*TXO*"), and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) ("*Haslip*"), and applied the principles of those cases in the manner requested by OXY. OXY got the due process it wanted, but not the result; (4) this unique fact-bound case was a classic case for jury determination and is of interest only to the parties; (5) the alleged "conflict" among the Circuits is nonexistent; (6) the only question arguably preserved -- whether the verdict is excessive under the unique facts of this case -- is neither of exceptional importance nor does it contain issues likely to recur; and (7) the result urged by OXY is bad policy and would lead to absurd results.

Any of these is sufficient to deny certiorari. All exist. The Petition should be denied.

STATEMENT OF THE CASE

The menu of "errors" contained in OXY's Petition is predicated on a caricature of the record.[1] Of course, this Court

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[1] OXY concedes that its intentional misconduct was sufficiently egregious to warrant a punitive damage award of some amount but not $30 million (Petition, p. 21). OXY's argument is based entirely on its version of the facts and is of no value to the Court. The record, on the other hand, is of immense value to the Court. Because OXY failed to inform the Court of the record, CTR is obligated

(continued...)

generally accepts an appellate court's findings as to "what occurred at the trial" and "the basis of the verdict", *Minneapolis St. P. & S. S. M. Ry. Co. v. Moquin*, 283 U.S. 520, 521 (1931), and here the finding was that OXY's intentional wrongful conduct was "certifiably reprehensible," "insidious" and "oppressive." (Pet App. 62a, 51a, 15a, 21a-22a.) This case has all of the characteristics of misconduct identified by this Court in *TXO* to support a large punitive award -- only more so. *See TXO*, 113 S.Ct. at 2718-22, 2726-27.

A. EVIDENCE AT TRIAL [2]

Beginning in approximately 1987, OXY concocted a "plan"[3] to maliciously interfere with CTR and other producers. (App. 1a, ¶ 1.) The stated purpose of this "plan" was to prevent CTR and other producers from selling natural gas in the free market, in order to force them to enter into non-competitive contracts with OXY so that OXY could reap massive profits. OXY used every tool available to execute its plan for profit, including surveillance (App. 1a, ¶ 2); deliberately shutting-in CTR's and other producers' gas wells (App. 1a, ¶ 3); lying and committing repeated acts of uncontroverted fraud on CTR (App. 1a, ¶ 4);

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[1] (...continued)
to do so pursuant to Sup.Ct.R. 15.1. In the interest of brevity, CTR also incorporates by reference the facts identified in the lower courts' Opinions set forth in OXY's Appendix.

[2] Some of the record references supporting the verdict are identified in the attached Appendix A (1a-2a). The record in this case consists of thousands of pages. CTR is in no way attempting to identify every item of evidence which supports the verdict. Rather, the record references in Appendix A are by way of example. The opinions attached to OXY's Appendix also support the above summary.

[3] In an amazing twist of the record, OXY now asserts that it was CTR's "plan" which was the genesis of this dispute. Of course, there is no record support for this prevarication.

falsifying and altering documents to cover-up its liability (App. 1a, ¶ 5)[4]; testifying falsely under oath (App. 1a, ¶ 6); repeatedly repudiating and breaching contracts (Pet. App. 11a, 21a, 39a-40a, 48a-49a); lying to third parties (App. 1a, ¶ 7); attempting to steal CTR's gas without paying for it to induce CTR to change its position (App. 1a, ¶ 8); filing sham lawsuits against third parties who tried to do business with CTR (App. 1a, ¶ 9); and impermissibly charging millions of dollars of gathering fees to increase its profits knowing it had no right to do so (Pet. App. 49a, 51a).

"Coercing weaker competitors to keep them in their place was Oxy's method of conducting business." (Pet. App. 50a.) OXY admitted its interference before, during and after trial. The only real issue at trial was whether that interference was justified, privileged or excused. OXY tried to justify its tortious interference by asserting contract rights to CTR's gas. CTR proved at trial, however, that OXY's assertion was a sham -- *i.e.*, it was based on contracts which had been terminated, fraudulently induced, had expired, were nonexistent and/or had been materially breached. OXY's actions not only pushed CTR's business to the verge of collapse but also inflicted tortious misconduct on hundreds of other oil and gas producers, affecting potentially 6,000 contracts resulting in OXY receiving millions of dollars in profit. (App. 1a-2a, ¶ 10; Pet. App. 14a-22a, 47a-53a.) The misconduct was so flagrant OXY was forced to admit at trial that it interfered with CTR (1) to make money, and (2) to ensure no other producer would try to escape from OXY's interference. (App. 1a-2a, ¶ 15.)

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[4] The Ohio Supreme Court recently held in a case in which this Court denied certiorari that the act of altering and destroying records to avoid liability cannot be tolerated in a civilized society, and that such conduct is particularly deserving of punishment in the form of punitive damages. *Moskovitzv. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 343 (Ohio 1994), *cert. denied*, 115 S.Ct. 668 (1994).

B. JURY VERDICT AND POST-TRIAL PROCEEDINGS

At the close of the evidence, the trial court found there was clear and convincing evidence that showed OXY's conduct evinced oppression and wanton, reckless disregard for CTR's rights. Consequently, the court lifted the "cap" on punitive damages.[5] (Pet. App. 41a-44a.) It was only after the trial court made this finding that it permitted CTR to introduce evidence -- without objection -- of OXY's financial condition. The court then tempered the discretion of the eight-person jury -- two more than legally required[6] -- by "handcrafted deliberation instructions." (Pet App. 44a-46a.) OXY did not object to the court's instruction on punitive damages on the grounds now raised in its Petition, nor did it offer a more detailed instruction.[7] The jury, as trier of fact, independently found OXY's conduct to be heinous, justifying severe punishment.

The trial court conducted an exhaustive 18 month post-trial review of the verdict, including reviewing the entire trial transcript, the exhibits and holding oral argument. (Pet App. 33a-63a.) OXY notably did not challenge on appeal the finding of clear and convincing evidence to lift the cap or the jury's finding of sufficient evidence to support a punitive damages assessment. The Tenth Circuit addressed each of OXY's arguments and, based on its own substantive due process review, found "several factors that support the extremely large punitive damages award." (Pet. App.

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[5] The Oklahoma Legislature instituted this procedural safeguard to ensure that punitive damages awarded under state law are not excessive and that ample due process safeguards are built into the process. *See* Okla. Stat. tit. 23, § 9 (1991).

[6] Studies have shown that there is an increased reliability where juries consist of more than six jurors. *See Ballew v. Georgia*, 435 U.S. 223, 229-44 (1978); *Hanson v. Parkside Surgery Center*, 872 F.2d 745, 750 (6th Cir.), *cert. denied*, 493 U.S. 944 (1989).

[7] In fact, OXY asked the court to give the identical punitive damage instruction on its failed counterclaim.

21a.) The punitive damages entered represents less than 1% of OXY's net worth. The fact that this sum happened to be approximately 111 times the compensatory damages the trial court allowed the jury to consider is an arithmetic curiosity with absolutely no constitutional relevance.

REASONS FOR DENYING THE WRIT

A. REASON ONE - OXY FAILED TO PRESENT AND PRESERVE QUESTIONS 1 AND 2

OXY attempts to raise new arguments never before presented in this case in a transparent effort to make this case appear to be in line with *BMW of North America, Inc. v. Gore*, 115 S.Ct. 932 (1995) ("*BMW*") -- which it is clearly not. Because OXY failed to present or preserve the questions identified in the Petition, they should not now be considered.

1. OXY Failed To Preserve The Issue Presented On The Tenth Circuit's "Shock The Judicial Conscience" Standard Of Review

OXY did not challenge the Tenth Circuit's use of the "shock the judicial conscience" standard. Rather, it told the Tenth Circuit the use of that standard was correct and comported with due process because it required the award be tested by four "critical" objective factors identified in *Haslip* and utilized by the Oklahoma Supreme Court. (App. 2a, ¶ 16.) The Court of Appeals did exactly what OXY asked and reviewed the award by applying the precise factors identified by OXY. (Pet. App. 12a-22a.) Thus, Question No. 1 which asks, *inter alia*, whether the "shocks the judicial conscience" standard comports with the Due Process Clause and standards for review of federal jury verdicts is not properly before this Court. It would be an odd world indeed to allow a party to convince an appellate court to do precisely what it asks and then urge in a certiorari petition that the court erred in so doing.

2. OXY Failed To Raise Any Issue Concerning A Conflict Among The Circuits Or That The Tenth Circuit Applied The Wrong Standards

OXY's related argument that there is a conflict among the federal courts of appeals concerning the appropriate standards for review (including a "comparative" analysis) is also not properly before this Court. OXY did not assert a circuit conflict in the issues raised on appeal, its Appeal Brief or Petition for Rehearing and Suggestion for Rehearing In Banc ("Rehearing Petition") or its Motion to Stay the Mandate. OXY also did not assert that the Court of Appeals applied the wrong standards in its review of the verdict -- rather it asked that the court apply those standards.[8] Finally, contrary to OXY's claim, the Court of Appeals discussed, compared and distinguished the cases cited by OXY. OXY may not now complain that the court below did exactly what OXY asked.

3. OXY Also Failed To Preserve Any Question Concerning Its Financial Condition

OXY asked the district court to instruct the jury concerning the subject of wealth.in the jury instructions and the district court did just that. OXY stipulated without objection to the introduction of its financial condition (which consisted of a single exhibit without testimony at the close of the evidence) and did not object to closing arguments discussing that financial condition. OXY did not request a bifurcated proceeding nor did it take advantage of procedures permitting it to introduce evidence of mitigating factors

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[8] For example, OXY told the district court it was required to apply four "critical" factors identified by *Haslip* -- none of which was the "comparison" analysis it now says the district court should have applied. (App. 2a, ¶ 17.) OXY argued on appeal that the district court's conclusions were erroneous -- not that the district court had applied the wrong factors in reaching those conclusions. (App. 3a, ¶ 18.) In its Rehearing Petition, OXY conceded that the Tenth Circuit applied the appropriate factors. (App. 3a, ¶ 19.)

on financial condition. OXY's only argument on financial condition is that the jury instruction supposedly unfairly singled out wealth and followed a so-called "inflammatory" closing argument. (Petition, pp. 27-30.) The Tenth Circuit held that OXY waived any error on these issues. (Pet. App. 17a.) *Accord Dunn*, 1 F.3d at 1378-79. Further, OXY argued in post-trial motions and on appeal that wealth was a relevant consideration. OXY cannot now complain that the district court and the Court of Appeals cited OXY's financial condition as a relevant factor in affirming the award. (Pet. App. 17a.)

4. Summary

In sum, OXY did not raise the certiorari questions in its post-trial proceedings, on appeal, in its Rehearing Petition,[9] or even in its motion to stay the mandate. This Court will not address claims that were not presented and preserved below. *See United States v. Alvarez-Sanchez*, 114 S.Ct. 1599, 1605 n.5 (1994); *Equal Employment Opportunity Comm'n v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (The Court's "normal practice ... is to refrain from addressing issues not raised in the Court of Appeals."). There are no exceptional circumstances present for this Court to review the questions presented, nor was there a sufficient foundation laid below to allow such a review to occur.

B. REASON TWO - THE DECISION IS PLAINLY CORRECT

Each procedural and substantive due process safeguard required by this Court is present in this case: (1) an eight person jury was determined to be impartial; (2) the district court, pursuant

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[9] For example, the questions identified in the Rehearing Petition as being ones of "exceptional importance" are completely different than the questions OXY now says require the exercise of this Court's extraordinary jurisdiction. (App. 3a, ¶ 20.)

to Oklahoma statute, found by clear and convincing evidence that OXY's conduct was sufficiently malicious to "lift the cap" and allow the jury to consider awarding punitive damages in excess of actual damages; (3) the assessment of the damages was a product of collective deliberation based on the evidence, proper instructions and argument of adversaries; (4) the award was exhaustively reviewed by the trial judge who also heard the testimony; (5) the award was subjected to a rigorous procedural and substantive review by the Court of Appeals and unanimously affirmed; (6) OXY's Petition for Rehearing was unanimously denied and its Suggestion for Rehearing In Banc was reviewed and denied by eight Judges.

These circumstances indicate that the award is entitled to a strong presumption of validity -- indeed, there are persuasive reasons for suggesting the presumption should be irrebuttable. *TXO*, 113 S.Ct. at 2720. In its Rehearing Petition, OXY conceded the Court of Appeals applied the appropriate factors in its review, but nevertheless urged that "viewed in the aggregate, these factors fail to justify an award of this magnitude." (Rehearing Petition, p. 4.) Of course, factual disputes are not a sufficient basis for review by this Court. *See General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175 (1938) (Supreme Court will not grant writ of certiorari merely to review evidence or inferences drawn from it).

C. REASON THREE - THERE IS NO CONFLICT AMONG THE CIRCUITS

The decision below is not in conflict with the decisions of this Court or of any court of appeals, and the court below did not depart from the accepted and usual course of judicial proceedings. Nor does the case present any novel or important question of

federal law.[10] Rather, it merely represents a straightforward application of settled law to a specific set of facts. OXY seeks to transform well-recognized rules of civil and appellate procedure into nonexistent circuit conflicts and asserts questions of due process already resolved by this Court in *Honda, TXO* and *Haslip*. A careful review of the cases cited by OXY and subsequent decisions by the circuit courts show that there is no "real and embarrassing conflict of opinion and authority" between the Court of Appeals' decision in this case and the decisions cited by OXY. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *accord, Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813 (1931) ("[T]he asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law.").

D. REASON FOUR - THIS COURT SHOULD DENY THE PETITION NOW – THERE IS NO REASON TO WAIT FOR THE DECISION IN *BMW*

There is no reason to hold this Petition in abeyance pending the Court's decision in *BMW*.[11] The constitutional issues

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[10] Procedural and substantive due process apply equally to federal and state courts alike. *Morgan v. Woessner*, 997 F.2d 1244, 1257-58 (9th Cir. 1993), *cert. dismissed*, 114 S.Ct. 671 (1994). Thus, the imposition of punitive damages in federal court on state claims does not raise "unique" concerns as asserted by OXY. (Petition, pp. 9, 12.) Moreover, OXY failed to move for a judgment as a matter of law at the close of the case and thereby failed to preserve any issue concerning a Fed.R.Civ.P. 50 review, and the review standards on a motion for new trial under Fed.R.Civ.P. 59 are well established. *See* discussion *infra*.

[11] Since the filing of the petition for writ of certiorari by BMW, this Court has denied certiorari in eight punitive damage cases. *See Berj Boyajian v. Olfacto-Labs*, 63 USLW 3756 (U.S. May 30, 1995) (No. 94-1636); *AJ & AJ Servicing, Inc. v. Tudor Assoc., Ltd., II*, 63 USLW 3817 (U.S. May 15, 1995) (No. 94-1380); *M. Harold Ezzone v. Willis M. Hansen*, 63 USLW 3817 (U.S. May 15, 1995) (No. 94-1513); *Ferrellgas, Inc. v. Clay*, 115 S.Ct. 1102 (1995) (No. 94-1066); *Dow*

(continued...)

presented in *BMW* have nothing in common with this case. First, unlike the defendant in *BMW*, OXY has not been punished for arguably lawful transactions that occurred outside the state. OXY's offending conduct against CTR took place entirely in Oklahoma. Thus, the primary issue of extraterritorial punishment raised by *BMW* was not presented to the court below nor is it presented here.

Second, *BMW* does not involve the type of reprehensible, fraudulent, intentionally tortious conduct present here. Punitive damages of $2 million for imperceptibly touching up the paint on a new BMW without revealing that fact to the purchaser might be suspect under *BMW*'s facts; but punitive damages are properly awarded, and in significant amounts, in cases of intentional tort, deceit, conversion and fraudulent trade practices. *See TXO*, 113 S.Ct. at 2726 (Kennedy, J., concurring).

Third, the principles of law urged by *BMW* and its amici are not only different from those urged by OXY, they are inconsistent. *BMW* does not assert that a comparative analysis is an essential or even an appropriate component of an excessiveness review. (*See BMW* Petitioner's Brief, pp. 29-44.) *BMW* and its amici are instead concerned with multiple punishment for the same act or course of conduct -- an issue wholly lacking here. More fundamentally, *BMW* and its amici concede that there should be no mechanistic test applied. Rather, *BMW* and its amici agree that each case should be determined on its own facts and that intentional tortious conduct (such as that employed by OXY in this case) is a sufficient basis to warrant large punitive damages -- particularly where the profit motive is large. (*See, e.g., BMW* Petitioner's Brief, pp. 22, 28, 30-32, 37.)

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11 *(...continued)*

Corning Corp. v. Hopkins, 115 S.Ct. 734 (1995) (No. 94-861); *Figgie v. Moskovitz*, 115 S.Ct. 668 (1994) (No. 94-781); *Louisiana-Pacific Corp. v. Orjias*, 115 S.Ct. 511 (1994) (No. 94-536); and *Jacobs Mfg. Co. v. Sam Brown Co.*, 115 S.Ct. 487 (1995) (No. 94-653) and 115 S.Ct. 1251 (1995) (No. 94-989). Each of those cases raised issues substantially identical to those raised by OXY.

E. REASON FIVE - THIS CASE IS NOT ONE OF EXCEPTIONAL IMPORTANCE NOR DOES IT CONTAIN ISSUES LIKELY TO RECUR

While the outcome may be of vital importance to the parties, the distinctive nature of this case will have no precedential value beyond its facts. Other than the application of *Haslip*, which itself presents nothing novel, OXY has raised only questions concerning the sufficiency of the evidence which are not constitutional and which were correctly decided.

Moreover, our federal structure of government "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society" and "allows for more innovation and experimentation in government." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). To promote the development of sound public policy, this Court has recognized the need to leave breathing space for state experimentation.

Such breathing space is especially warranted now. The lower courts are only now having the opportunity to apply the principles refined in *TXO* and *Honda*. Moreover, the state legislatures and Congress are in the midst of a dramatic and unprecedented recrafting of the law of punitive damages by enacting a broad array of measures for guiding and limiting the assessment of punitive damages. For example, although Oklahoma is one of only three states to restrict an award of punitive damages to no more than actual damages unless extraordinary circumstances are shown, the Oklahoma Legislature is currently in the process of enacting further limitations to the Oklahoma punitive damages statute.

Oklahoma is not unique.[12] The Justices of this Court

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[12] In fact, only five states have not enacted punitive damage limiting legislation in the past two decades. *See* Thomas Koenig & Michael Rustad, *The Quiet Revo-*

(continued...)

have recognized that a state's interest in punitive damages is largely one of a legislative and public policy concern. *See, e.g.*, *TXO*, 113 S.Ct. at 2724, 2727 (Kennedy, J., concurring) (referring to the possibility of "legislative intervention that might prevent unjust punitive awards."); (Scalia, J., with Thomas, J., concurring) ("[s]tate legislatures and courts have ample authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime."). Even if there is a so-called "punitive damage crisis," which Respondents submit the empirical evidence shows there is not -- states and Congress are dealing with it.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE FACTORS OXY ASKED IT TO APPLY AND SUCH APPLICATION PRESENTS NO CONFLICT AMONG THE CIRCUITS

After asking the Court of Appeals to apply its "shocks the judicial conscience" standard of review, OXY now tells this Court that such a standard is inappropriate and that the Circuits are in conflict -- indeed, "disarray" as to how to conduct judicial review of punitive damages. (Petition, p. 11.) This conclusion is based primarily on OXY's unscientific and selective discussion of punitive damage cases in other jurisdictions.[13] However, even OXY admits that the review process that is occurring in Oklahoma and the Tenth Circuit -- a process OXY was willing to accept until

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12 (...continued)
lution Revisited: An Empirical Study Of The Impact Of State Tort Reform On Punitive Damages In Products Liability, 16 Just. Sys. J. 21 (1993).

[13] OXY unabashedly cites its own counsel's amicus brief in *BMW* to support its conclusions. (Petition, p. 7.) Counsel's conclusions concerning punitive damages in Alabama are vastly different from the empirical evidence presented to the Alabama courts in the post-trial review process. *See Duck Head Apparel Co., Inc. v. Hoots*, __ So.2d __, 1995 WL 64270, *28 (Ala. Feb. 17, 1995).

the results were issued -- has worked well and uncontroversially. (Petition, pp. 18-19.) OXY's "standard of review" question is not only procedurally deficient -- *see* pages 5-7, *supra* -- it is also substantively without merit.

A. THE REVIEW PROCESS IS WORKING

OXY argues that there is an "unabated" punitive damages explosion.[14] It also suggests that judicial review of punitive damage awards is becoming "extinct"[15] resulting in awards that are arbitrary, capricious and growing in size and number. Both claims are demonstrably false.[16] A recent review of punitive

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[14] OXY's punitive damage explosion analysis is counter-intuitive. On the one hand, OXY suggests that punitive damages are out of control and are being awarded in huge, arbitrary and capricious amounts. On the other, it suggests that if the Court applied a pure comparative analysis to this case, all other cases involve smaller punitive damage awards and this award should therefore be reduced. This "heads I win, tails you lose" sophistry exposes the transparency of OXY's moving target litigation tactics.

[15] OXY's conclusions concerning judicial review after *TXO* (Petition, p. 10) is erroneous and misleading. First, it is based on an extremely small sample and therefore suspect. *See Honda*, 114 S.Ct. at 2341 n.11. Second, it is simply wrong. For example, the courts in *Boyle v. Lorimar Productions, Inc.*, 13 F.3d 1357 (9th Cir. 1994), *Burke v. Deere & Co.*, 6 F.3d 497 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 1063 (1994), *Jeffries v. Harleston*, 21 F.3d 1238 (2nd Cir. 1994), among others, reversed or vacated punitive damage awards after *TXO*. Third, the "survey" does not take into account federal district court review. *See Honda*, 114 S.Ct. at 2341 n.11. Finally, because due process applies equally to state and federal courts, OXY's omission of cases involving state court review after *TXO* is telling as many state appellate and district courts have reversed or remitted punitive damage awards.

[16] The suggestion that jurors are arbitrary and capricious conflicts with every available empirical study. *See generally*, Valerie P. Hans & William F. Lofquist, *Jurors' Judgments Of Business Liability In Tort Cases: Implications For The Litigation Explosion Debate*, Law & Society Review, Vol. 26, No. 1 at 11 (1992); (continued...)

damage research conducted by federal government researchers, independent foundations and university scholars concludes that "every empirical study of the [punitive damages] question has reached conclusions that, to say the least, fail to support" the claim that punitive damages have grown dramatically in both frequency and size.[17] The cases referenced in OXY's Petition show that under appropriate facts and circumstances, the Tenth Circuit and the Oklahoma Supreme Court have (and will) reduce or reverse punitive damage awards on excessiveness grounds. (Petition, pp. 18-19.) *See also Honda*, 114 S.Ct. at 2341 n.11 (concluding that empirical evidence shows that review process is working); *Dunn v. HOVIC*, 1 F.3d 1371, 1388 (3rd Cir.), *modified in part*, 13 F.3d 58 (3rd Cir.), *cert. denied*, 114 S.Ct. 650 (1993) (same). The Tenth Circuit applied the identical legal principles in this case that it had previously applied in the cases referenced by OXY. What is different between this case and the cases referenced by OXY is the record, and it is the record which is paramount, not what different juries or judges did based on different facts.

Finally, even if one could conclude that punitive damage verdicts have increased against businesses, that fact is more likely attributable to the explosion of corporate crime and unethical conduct which has befallen this country than arbitrary awards. For

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16 (...continued)
Edith Greene, *et al., Jurors' Attitudes About Civil Litigation And The Size Of Damage Awards*, 40 Am. U. L. Rev. 805 (1991).

17 Michael J. Saks, *Do We Really Know Anything About The Behavior Of The Tort Litigation System -- And Why Not?*, 140 U. Pa. L. Rev. 1147, 1254 (April 1992). *See, e.g.*, Michael Rustad, *Demystifying Punitive Damages In Products Liability Cases: A Survey Of A Quarter Century Of Trial Verdicts* (The Roscoe Pound Foundation ed., 1991); Stephen Daniels & Joanne Martin, *Myth And Reality In Punitive Damages*, 75 Minn. L. Rev. 1 (Oct. 1990); William M. Landes & Richard A. Posner, *The Economic Structure Of Tort Law* (1987); Michael Rustad & Thomas Koenig, *The Historical Continuity Of Punitive Damages Awards: Reforming The Tort Reformers*, 42 Am. U. L. Rev. 1269 (Summer 1993).

example, the average criminal fine per offense imposed on organizations rose almost 20 times (to over $800,000 per offense) from the mid-1980's to 1990 and is steadily increasing.[18] Even so, these same companies are treating the fines merely as a cost of doing business.[19]

B. THERE IS NO CONFLICT AMONG THE COURTS OF APPEAL ON THE STANDARD OF REVIEW OR THE FACTORS TO BE APPLIED

1. The Tenth Circuit Applied The Correct Standard

OXY represents the "shock the conscience" standard as a barren phrase which Oklahoma and the Tenth Circuit use to judge punitive damage awards. OXY does not disclose that it asked the court to apply time-tested factors employed by Oklahoma courts and the Tenth Circuit in performing that review. This Court recently emphasized the procedural component of due process and indicated that "traditional practice provides a touchstone for constitutional analysis" and "the common law method of assessing punitive damages d[oes] not violate procedural due process." *Honda*, 114 S.Ct. at 2335, 2339.[20]

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[18] Mark A. Cohen, *Corporate Crime And Punishment: An Update On Sentencing Practice In The Federal Courts, 1988-1990*, 71 B. U. L. Rev. 247 (March 1991).

[19] *See* Amitai Etzioni, *Going Soft On Corporate Crime*, The Wash. Post, April 1, 1990, at C-3, concluding that 62% of Fortune 500 industrial corporations were involved in one or more incidents of corrupt behavior and that the low degree of punishment "allowed many corporations to treat potential fines as a 'cost of doing business.'" *Id.*

[20] Under this approach, judges "generally defer[ ] to the jury's determination of damages" and ask only whether "the damages are 'outrageous,' and 'all mankind

(continued...)

In the proceeding below, at OXY's request, the Tenth Circuit used the three-stage review process identified in *Haslip*. It applied the precise standards requested by OXY and identified by this Court as being relevant to judicial review. These factors are consistent with the federal organizational sentencing guidelines which take into account the seriousness of the offense, the culpability of the organization, the necessity to remedy the harm caused, the pecuniary gain to the organization, the pecuniary loss from the offense, the size of the organization, the level of management involvement, etc. *See* 18 U.S.C. Appx. § 8, *et seq*. Under these factors and taking into account the amount of money involved, the pecuniary gain to OXY, and the other facts identified at pages 2-3, *supra*, and 24-30, *infra*, OXY's multiple offenses could have conservatively generated fines of tens of millions of dollars. *Id*.

2. OXY's Claimed Error Is Illusory

OXY's real argument -- (1) that the Tenth Circuit refused to include as a factor for review "a comparison of the award with awards in similar cases," and (2) that such refusal placed it in

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20 (...continued)
at first blush must think so'" or whether damages are "'so monstrous and excessive, as to be in themselves an evidence of passion or partiality in the jury.'" *Honda*, 114 S.Ct. at 2336 (citations omitted). The Court explained:

> Although courts adopting a more deferential approach use different verbal formulations, there may not be much practical difference between review which focuses on "passion and prejudice," "gross excessiveness," or whether the verdict was "against the great weight of the evidence." All of these may be rough equivalents of the standard this Court articulated in *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (whether "no rational trier of fact could have" reached the same verdict).

114 S.Ct. at 2341 n.10.

conflict with decisions in other Circuits -- has been waived and in any event, is wrong for four reasons.

a. The Tenth Circuit Compared This Case With The Cases Cited By OXY

OXY argued in the court below that there was a distinction between cases involving only economic injury and those involving personal injury. The cases relied on by OXY were dissimilar in their facts and the applicable law. Thus, the Tenth Circuit addressed, compared and distinguished those cases. (Pet. App. 19a-20a.) The Tenth Circuit went further and compared the award to similar cases and found that under like circumstances, substantial verdicts had been entered. (*Id.*) OXY's representation, therefore, that the Tenth Circuit held that a comparative analysis would "exceed our scope of review" is misleading and taken out of context. What the Tenth Circuit held is that "we would exceed our scope of review if we required symmetry in the manner OXY suggests" (emphasis supplied) (Pet App. 20a), and the symmetry OXY requested was that a comparison analysis (of cases involving companies with larger net worth and smaller punitive damage awards) mandated that this award be reduced. (*Id.*) Of course, OXY's argument conflicts with this Court's holdings in *TXO* and *Haslip* (there can be no "mathematical bright line between the constitutionally acceptable and constitutionally unacceptable that would fit every case." *Haslip*, 499 U.S. at 18.)

b. There Is No Conflict Among The Circuits

All federal courts of appeal apply the three-tier review process discussed in *Haslip*. Thus, there is no conflict among the Circuits, as OXY pretends. The Ninth Circuit in *Morgan* adopted the same three-stage approach used by the Tenth Circuit, and it used a deferential "grossly excessive" standard in reviewing the punitive damage verdict. It did so, on the state claims, by reference to standards identified by "California law." 997 F.2d at

1259.[21] In applying these standards, the court observed that it was permissible but not required (as the Tenth Circuit found) to "look at awards in similar cases" as one of many factors.

The Third Circuit in *Dunn v. HOVIC*, *supra*, also applied a "shock the conscience" standard. That court *en banc* underscored the fact-intensive nature of the *Haslip* due process analysis. 1 F.3d at 1382. It did not, as OXY asserts, fashion a federal standard of review but rather applied the law of the Virgin Islands which had adopted by statute the *Restatement (Second) of Torts*. 1 F.3d at 1374, 1378-91. Section 908(2) of the *Restatement* happens to include as a factor a consideration of awards of punitive damages in similar cases. OXY also errs in claiming that the court conducted a "*de novo*" review of punitive damage awards in similar cases. Instead, the *en banc* decision embraced a deferential review of the award based on a variety of factors (1 F.3d at 1381), including one factor inapplicable here but paramount in *Dunn, i.e.*, "the effect of successive punitive awards in asbestos litigation." 1 F.3d at 1391.

The Seventh Circuit decision cited by OXY also applied state law to determine that among the review factors to be considered was a comparison of the award to analogous settings. In *DeRance, Inc. v. PaineWebber, Inc.*, 872 F.2d 1312 (7th Cir. 1989), the court did not reduce the $7 million punitive award by contrasting it with awards in analogous settings, but rather based the reduction "entirely upon the conclusion that the award was excessive because it exceeded the amount commensurate with the degree of PaineWebber's wrongdoing." 872 F.2d at 1329 n.10.[22]

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[21] In *Morgan*, there were both federal and state law claims and the court applied federal standards to the federal claims and state law factors to the state law claims.

[22] OXY's citation of *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991) is questionable after the Fourth Circuit's *en banc* decision in *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1416 (4th Cir. 1992) and its subsequent decisions in *Tudor Assoc., Ltd., II v. AJ & AJ Servicing, Inc.*, 36 F.3d 1094, 1994 WL

(continued...)

OXY also overlooks that both the review process used and standards applied by other courts of appeal (and subsequent decisions in the above Circuits) both before and after this Court's decision in *TXO*[23] are entirely consistent with the Tenth Circuit's review process.[24] For example, every federal court of appeals after *Haslip* has held that the reviewing court in a diversity case is to determine whether the jury's verdict is within the confines set by state law and substantive due process by reference to deferential federal standards developed under Rule 59. *Id*; *see generally Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989). The cases cited by OXY show that far from being in conflict, the Circuits are substantially uniform concerning the review process. The fact that OXY failed to preserve many of its arguments at trial and did not get the result

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[22] (...continued)
510456 (4th Cir. 1994), *cert. denied*, 63 USLW 3812, 63 USLW 3817 (May 15, 1995); *Winant v. Bostic*, 5 F.3d 767 (4th Cir. 1993). Moreover, the lack of an entitlement under state law to any award of punitive damages under the facts in *Mattison* renders the opinion in that case pure *dictum*, not affording it precedential authority. *Colgrove v. Battin*, 413 U.S. 149, 152 & n.13 (1973).

[23] The cases cited by OXY were all decided before this Court's decision in *TXO*.

[24] The following cases used a three-stage review process applying state law factors substantially identical to those used in the courts below. *See Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1251 (1995); *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 734 (1995); *Chemstar, Inc. v. Liberty Mutual Ins. Co.*, 42 F.3d 1398, 1994 WL 650018 (9th Cir. 1994), *petition for cert. filed*, 63 USLW 3599 (U.S. Feb. 6, 1995); *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 14 F.3d 373 (8th Cir. 1993) (*en banc*), *cert. denied*, 114 S.Ct. 2120 (1994); *King v. Macri*, 993 F.2d 294, 299 (2nd Cir. 1993); *Europlast, Ltd. v. Oak Switch Sys.*, 10 F.3d 1266, 1276 (7th Cir. 1993); *Vasbinder v. Scott*, 976 F.2d 118 (2nd Cir. 1992); *Keenan v. City of Philadelphia*, 983 F.2d 459 (3rd Cir. 1992); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, 503 U.S. 1011 (1992); *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1380-86 (5th Cir. 1991).

it wanted does not mean that an appropriate review was not had. Contrary to OXY's analysis, review is not synonymous with reversal and/or remittitur.

c. The Results OXY Seeks Would Make Bad Policy

In *Haslip* and *TXO*, this Court rejected the utility of a comparative approach as a test for assessing whether a particular punitive damage award is presumptively unconstitutional. After mentioning in a single sentence the existence of Alabama's comparative analysis factor, the Court in *Haslip* did not cite that aspect of Alabama law again, and certainly did not identify it as an important aspect of appellate review.[25] (Nor did OXY insist that it was an important aspect of judicial review in the courts below.) In *TXO*, this Court went further and refused to "enshrine petitioner's comparative approach in a 'test' for assessing the constitutionality of punitive damages," because, *inter alia*, each case is unique. 113 S.Ct. at 2720.

Even if the issue were in doubt, the result OXY seeks to achieve -- setting a judicial cap on punitive damages -- is bad policy. An illustration demonstrates the arbitrariness of such a rule. If the first ten cases of any particular tort under similar circumstances resulted in punitive damage verdicts of no more than X dollars, no other case, according to OXY, no matter how egregious the circumstances, could ever warrant a larger punitive damage award. The factors cited by this Court as essential to the review process would be, according to OXY, irrelevant. Such a robotic formula is not only contrary to this Court's prior holdings but would also lead to absurd results. The Fifth Circuit in *In re Air Crash Disaster Near New Orleans, La.*, 767 F.2d 1151, 1156-57 (5th Cir. 1985)

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[25] Interestingly, when the Alabama Supreme Court reviewed the punitive damage award in *Haslip*, it also did not make reference to any comparison to other awards. *Haslip*, 553 So.2d 537, 543 (Ala. 1989).

(cited by OXY in support of its argument)[26] recognized this problem and concluded that the touchstone to any standard allowing prior awards to serve as an aid in performing an excessive analysis must be the facts and the record of the individual case. "Of course, simply because certain awards have been *affirmed* does not indicate that these are the highest, or even near the highest, awards which might be allowed." *Id.*

This Court reached the same conclusion in *TXO* that simply because a verdict may be the "highest on record" for a particular form of injury is no reason to reduce it.[27]

Plainly, it would be bad policy to judicially cap the reasonableness of a punitive damage award by reference to awards imposed under different circumstances against different defendants in different states with different facts, no matter what the misconduct is. OXY does not even attempt to explain how this process could possibly produce individualized justice.

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[26] OXY cites the *In re Air Crash* case, among others (Petition, p. 17), to support its argument that Fed.R.Civ.P. 59 required the district court to apply a comparison analysis in reviewing the punitive damage award. (*Id.*) OXY is wrong. OXY never asked the district court to undertake such an analysis. Moreover, none of the cases cited by OXY makes any such holding. They merely hold that pursuant to a particular state's practice under state law, a comparison of one award to awards in analogous cases is one of the many factors a reviewing court may consider. None of the cases hold, as OXY represents, that it would be an abuse of discretion as a matter of federal law not to make such a comparison.

[27] In *TXO*, this Court upheld a $10 million punitive damage judgment, even though TXO argued and the record showed that the award was 20 times larger than the highest punitive damage award ever upheld in West Virginia history, and was 10 times greater than the largest punitive damage award for the same tort in any jurisdiction.

d. The Result Remains The Same Under Any Approach

As noted, the Tenth Circuit applied a comparison analysis and it did not affect the outcome of this case. This is because the required comparison is of this case and similar and analogous cases. OXY did not ask the courts below to compare similar cases. Rather, it first made an arithmetic ratio comparison and then asserted some distinction between economic and non-economic cases. (Pet. App. 19a-20a.) Thus, OXY did not even request the Tenth Circuit to perform the type of comparison OXY now says was constitutionally required.[28] Moreover, compared with other intentional tort cases, the award was clearly in line.[29]

II. OXY HAS WAIVED ANY REVIEW CONCERNING ITS FINANCIAL CONDITION; IN ANY EVENT, THE PUNITIVE DAMAGES AWARD IS NOT EXCESSIVE AND WILL NOT BE AFFECTED BY THE RESULT IN *BMW*

There is no reason to grant certiorari in this case to "clarify" whether a defendant's financial condition is a relevant factor in assessing and reviewing a punitive damage award. Nor

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[28] The cases OXY now says should have been compared are not intentional tort cases, are distinguishable on the facts and, for the most part, were decided prior to the revision of Okla. Stat. tit. 23, § 9 (1991).

[29] *See Texaco Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987, *writ ref'd n.r.e.*), *cert. dismissed*, 485 U.S. 994 (1988) ($1 billion for interference); *Swanson v. Schlumberger Tech. Corp.*, 895 S.W.2d 719 (Tex. Civ. App. 1994, *writ requested*) ($35 million for business tort); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 732 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) ($25 million for tortious interference); *Federal Deposit Ins. Corp. v. W.R. Grace & Co.*, 691 F.Supp. 87, 100 (N.D. Ill. 1988), *aff'd in part and rev'd in part*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990) ($25 million for business tort); *TXO* ($10 million).

is there reason for this Court to consider whether the punitive damages award was excessive in this case. OXY's attack on the punitive damages award is nothing more than a request for a trial *de novo* on facts which the jury, trial judge and court of appeals found supported the award.

The procedural and substantive due process requirements identified by this Court were faithfully employed by the courts below and the judgment is thereby entitled to a strong presumption of validity. *TXO*, 113 S.Ct. at 2720. OXY had the benefit of the "full panoply" of Oklahoma and federal constitutional protections. *Haslip*, 499 U.S. at 3. Review should be denied.

A. OXY FAILED TO PRESERVE ANY ISSUE CONCERNING FINANCIAL CONDITION

OXY's vague question of "the extent to which a punitive damages award may be predicated on the financial status of the defendant" (Petition, p. 30) has been waived and does not warrant review. *See* discussion at pages 11-12, *supra*. It has also been answered. Financial condition is a relevant factor -- no more and no less. *See TXO*, 113 S.Ct. at 2722-23; *Haslip*, 499 U.S. at 21-22.

In any event, the factual foundation of OXY's argument that the award was based exclusively on OXY's financial condition is groundless and vanishes if one looks at the record. The record reveals an outrageous, calculated plan by a company headquartered in Oklahoma to steal, cheat and lie to prevent CTR from utilizing the free enterprise system.

B. OBJECTIVE FACTORS DEMONSTRATE THAT THE PUNITIVE DAMAGES WERE REASONABLE

OXY raises no issue not settled by this Court's prior decisions, yet it continues to argue that the facts proved at trial were

insufficient to support a large punitive damages award. The record belies the assertion.

1. Cause and Extent of CTR's Injury [30]

OXY's misconduct meets all of the indicia of reprehensibility. It was lengthy in duration. OXY management and attorneys orchestrated the conduct and were aware of the harm the conduct had caused and was likely to cause. After this case was filed, OXY tried to conceal its misconduct by altering and falsifying documents and lying at depositions. The misconduct was widespread. Contrary to OXY's assertion, this case was not simply a commercial dispute between sophisticated corporate parties concerning the interpretation and validity of contracts. (Petition, p. 21.)[31] Instead, as the Tenth Circuit noted, the cause of CTR's injury was the "voluminous evidence that OXY engaged in oppressive and coercive behavior that interfered with Plaintiffs' present and prospective contracts; the consequences of such unchecked behavior could be disastrous." (Pet. App. 21a-22a.)[32] This is the type of conduct that is particularly appropriate for large

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[30] OXY rephrases the factors it urged before the Tenth Circuit. CTR will use the factors OXY asked the Tenth Circuit to apply.

[31] OXY is even attempting to mislead this Court concerning the evidence. Attached to its Appendix are parts of letters provided to third parties. OXY fails to provide the Court with the remainder of the exhibits which included the terminated and expired contracts upon which OXY was relying to assert contract rights. As the district court concluded, OXY's communications with respect to these exhibits consisted of deception, lies and half-truths. (Pet. App. 39a-40a.) OXY's pattern of half-truths apparently is continuing in this Court as well.

[32] OXY's argument is also a curious one. Even OXY conceded in the lower courts that huge punitive damage verdicts are justified if compensatory damages do not reflect the full extent of the harm caused because third parties may have been substantially harmed and if the conduct is outrageous. (App. 3a, ¶ 21.) Such a concession did not help OXY then or now because OXY's conduct did indeed cause substantial harm to third parties and was truly outrageous.

punitive damages. It is precisely the type of wrongdoing that implicates fundamental state interests by interfering with the sanctity of private property and contract rights that lie at the heart of our economic system. Defendants who deliberately engage in an intentional and tortious scheme systematically conducted for profit are more likely to pause if they have to pay more than their expected gain.[33]

OXY's argument that CTR's injury was merely economic (Petition, pp. 23-24), therefore misses the mark.[34] For example, the federal organizational sentencing guidelines exact similar penalties for conduct causing only economic harm. *See* page 16, *supra*. The analysis of what is reasonable in a particular case does not focus on the type of a plaintiff's losses, but rather more appropriately focuses on the defendant's conduct, the potential harm to others and extraction of a defendant's expected profits. *See TXO*, 113 S.Ct. at 2722; *Haslip*, 499 U.S. at 20-22. Defendants who engage in intentional torts must expect the award to be necessarily large. *See, e.g., TXO*, 113 S.Ct. at 2724-26 (Kennedy, J., concurring). This is not a case of negligence or strict liability nor is it one of an innocent party stumbling into a trap for the unwary; instead it is a case of a fully-informed, economically powerful company aware of its options, evaluating those options,

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[33] *See, e.g.*, John C. Coffee, Jr., *"No Soul To Damn; No Body To Kick": An Unscandalized Inquiry Into The Problem Of Corporate Punishment*, 79 Mich. L. Rev. 386 (Jan. 1981) (concluding that economists agree that deterrence only works if punishment greatly exceeds expected gain).

[34] As the Tenth Circuit correctly noted, "there are no cases that hold punitive damages in economic cases must be less than those in personal injury cases..." (Pet. App. 19a) and OXY cites no such case to this Court. The record shows that the harm was great in that OXY almost decimated CTR's business requiring CTR to spend millions of dollars to avoid only a small portion of OXY's interference. OXY also failed to pay for gas and forced unwilling and noneconomic consumption of its services resulting in the plugging and abandoning of gas wells. (App. 2a, ¶ 11.)

and selecting the ones it perceived as being most profitable to it. One who deliberately and knowingly engages in intentional tortious misconduct should not be surprised that its liability will include punitive damages.[35]

The fact that OXY's defense in this case was a ruse, *i.e.*, the assertion of patently frivolous and nonexistent contract rights, *see* pages 2-3, *supra*, is also of no moment. The law of punitive damages would be made to stand on its head if a party could merely assert baseless and frivolous contract rights as a defense to otherwise oppressive conduct.[36]

Finally, OXY's claim that it had no notice that its interference with CTR's prospective business relations was wrongful is without merit. Prior to this case, Oklahoma had recognized the tort of tortious interference with prospective business relations and identified the elements of the tort. *See Overbeck v. Quaker Life Ins. Co.*, 757 P.2d 846 (Okl. Ct. App. 1984). Okla. Stat. tit. 76, § 1 (1991) also clearly defined OXY's conduct as tortious.[37] Moreover, OXY has waived this issue. It did not argue to the trial court that CTR's claims failed to state a claim upon which relief can be

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[35] *See, e.g.*, Amelia J. Toy, Note, *Statutory Punitive Damage Caps And The Profit Motive: An Economic Perspective*, 40 Emory L.J. 303 (Winter 1991); David D. Haddock, *et al.*, *An Ordinary Economic Rationale For Extraordinary Legal Sanctions*, 78 Calif. L. Rev. 1 (Jan. 1990); Werner Z. Hirsch, *Law And Economics: An Introductory Analysis*, p. 200 (1988).

[36] The fact that the court found factual questions on OXY's assertion of contract rights on certain of the contracts also does not help OXY. The jury and trial court, based on a developed record, found to the contrary.

[37] *See also John A. Henry & Co., Ltd. v. T.G.& Y. Stores Co.*, 941 F.2d 1068 (10th Cir. 1991), where the Tenth Circuit affirmed a federal district court's recognition of an analogous cause of action (resulting in punitive damages) prior to the interference in this case. The same counsel involved in the trial of the *John A. Henry* case was counsel in this case.

granted, nor did it object to the trial court's submission of punitive damages on CTR's prospective interference claim to the jury. Finally, it did not raise in the court below any issue concerning the constitutionality of retroactive punishment.

2. Harm To Society

OXY's plan for intentional wrongdoing was far-reaching. The record shows overt instances of misconduct against other producers such as shutting in other producers' wells, falsifying and altering documents, devising an overall "plan" to prevent other producers from selling their gas to other purchasers, and impermissibly charging other producers for gathering fees not allowed under its contracts. OXY itself tendered evidence that there were literally hundreds of producers and up to 6,000 contracts involved. (App. 2a, ¶ 12; Pet. App. 15a.)[38] No producer could sell their gas in the free market without OXY's interference -- they had to have a contract with OXY. (App. 2a, ¶ 14.) When CTR finally challenged OXY's anticompetitive conduct, OXY immediately began interfering with CTR's business relations because, as OXY's corporate representative, Joe Garrett, told the jury, "if we let this happen with one producer, we could expect for everybody to want to jump right in the middle of us and do the same thing. So we were trying to protect our plant." (App. 2a, ¶ 15.)

OXY blames the Tenth Circuit for its predicament by claiming the court relied on "gross and untethered speculation" in its conclusions of harm to others, but the record here (like that in *TXO*) showed specific evidence of OXY's wrongdoing to others,

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[38] Indeed, OXY's counsel acknowledged the 6,000 contracts in his Closing Argument. (App. 2a, ¶ 13.) OXY's new argument that these 6,000 contracts were with producers at its 18 gas processing plants located in many states and therefore any consideration of those contracts would be extraterritorial punishment is completely without record support. OXY never asserted any issue of extraterritorial punishment in the court below nor was there any evidence that these contracts and producers were at any plant other than the Rodman Plant.

and the Tenth Circuit found (as in *TXO*) that OXY's tortious conduct directed towards CTR was but part of pattern, practice and plan of deception and intentional wrongdoing.[39]

3. Profit Incentive

OXY concedes that profit incentive is an important component in determining the appropriate amount necessary to punish and deter. It nevertheless mischaracterizes both the record and the Tenth Circuit's holding concerning its profit incentive.

Prior to trial, OXY argued that it had been damaged by over $7 million just by the small amount of gas that CTR had been able to take off the Rodman System. At trial and on its motion for new trial, OXY continued to seek $4.25 million.[40] This "profit incentive" included only the gas CTR managed to take off the Rodman System. (Pet. App. 19a n.15.) Most of OXY's interfer-

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[39] OXY's reliance on the dismissal of CTR's antitrust claims as conflicting with a finding of societal harm is without merit. The antitrust claims were based on different facts, involved different wells, different conduct, different legal theories and different evidence. They were presented without a full development of the record and are irrelevant to a determination of whether OXY's tortious and malicious interference directed at thousands of producers involved widespread societal harm.

[40] The court noted that because OXY owned 50% of the Rodman Plant, it could have recovered only $2.125 million on its counterclaim. (Pet. App. 51a.) The incentive for the Plant and the amount of money sought nevertheless was the $4.25 million in addition to the profit incentive generated by the success of the scheme to interfere. OXY admitted that CTR had at least 140 wells at issue. (Rehearing Petition, p. 5). OXY's expert witness testified that the gas which eventually avoided the interference was only a "handful" of these wells and comprised its $4.25 million counterclaim. The Tenth Circuit found that this "handful" of wells alone created a $2.125 million profit incentive. When you include all of the gas at the Rodman Plant subject to OXY's interference, the profit incentive increased exponentially. Further, as the district court observed, it is impossible to quantify the benefits OXY realized by unjustly enriching its co-owner.

ence was successful and the remaining gas continued to flow through the Plant and OXY continued to profit by virtue of its interference. Thus, by preventing the remainder of the gas from going to the free market, the profit incentive was large indeed. The 6,000 contracts involved also support the conclusion that there was potential widespread injury and profit involved. (Pet. App. 19a-20a.) As a part of its profit incentive, OXY also impermissibly charged "gathering fees" on some of these contracts ranging anywhere from $.07 to $.29 per Mcf for over five years.

OXY itself introduced evidence that its interference was due to its enormous profit incentive. (Pet. App. 52a-53a.) OXY wanted to play the "enforcement lottery" by continuing its tortious practice and hoping that any lawsuits filed would result in judgments less than its profit motive. Perhaps now OXY will be tempted to turn its eyes away from its balance sheet and toward the law.

4. OXY's Financial Condition

CTR has shown above that the punitive damage award is justified based on factors other than OXY's financial position. Nevertheless, OXY did not object to such evidence at trial and conceded that financial condition was a relevant component of the review process. If it is a relevant component, it is not necessary that it be an impotent component.[41]

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[41] The uncontroverted evidence showed that OXY's net worth was $6 billion and that the punitive damages award was less than 1% of OXY's net worth. "[I]t is difficult to imagine that ... the judicial conscience can be shocked by a punitive damages assessment which is less than 1% of the financial net worth of the defendant." *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1985), *aff'd*, 486 U.S. 71 (1988). Applying the comparative analysis that OXY urges, this is the typical ratio of punitive damages to net worth. *Cash v. Beltmann North American Co., Inc.*, 900 F.2d 109, 111 (7th Cir. 1990). Indeed, many courts have held that a much higher ratio of punitive damages to net worth is appropriate. *See Moskovitz, supra* (33-50%); *Professional Seminar Consultants,*

(continued...)

Simply put, OXY waived any error on financial condition and its tactical decisions cannot now be reversed. As the district court observed:

> Oxy's stratagem backfired, and any resultant damage was aggravated by Oxy's decision not to introduce any other evidence at trial with regard to its net worth, nor even address the issue during the closing arguments. Oxy must now live with the consequences of its choices.... The trial, which spanned three weeks, was not merely a dress rehearsal for Oxy to correct defects in its trial strategy that went awry. (Pet. App. 58a.)

III. WHATEVER THIS COURT MAY HOLD IN *BMW*, IT WOULD NOT AFFECT THIS DECISION

The constitutional issues presented in *BMW* are not at issue here nor is there any question of extraterritorial punishment. Further, in this case neither the amount of punitive damages nor the findings below raise any issue as to excessiveness. Thus, there is no reason to hold this Petition pending the decision in *BMW*. *See* discussion at pages 9-10, *supra*.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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41 *(...continued)*

Inc. v. Sino Am. Tech. Exch. Council, Inc., 727 F.2d 1470 (9th Cir. 1984) (upholding punitive damages award representing approximately 40% of one defendant's net worth). *See generally*, Annot., *Punitive Damages: Relationship To Defendant's Wealth As Factor In Determining Propriety Of Award*, 87 A.L.R.4th 141 (1991).

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APPENDIX

APPENDIX A

Examples of record references which support the verdict and Statement of the Case:

1. "Plan" to maliciously interfere with CTR and other producers -- Aple. App. 1514, 1532-33.

2. Surveillance -- Aple. App. 618-32, 1885-90.

3. Deliberate shutting-in of CTR's and other producers' gas wells -- *see, e.g.*, Aple. App. 618-32, 791-93, 1515, 1522-26, 1532, 1832, 1834, 1871, 2187, 2216-17, 2247, 2258, 2309, 2314, 2429-33, 2457-58, 2460-63, 2490; Aplt. App. 2554.

4. Lying and acts of fraud -- Aple. App. 1435, 1573-75, 2105E-2124, 2339, 2344-54, 2388-94, 2450-52, 618-32.

5. Falsifying and altering documents -- *see, e.g.*, Aple. App. 1862, 1880, 2450-52.

6. False testimony -- Aple. App. 2461-63, 2468, 2633, 2460-63.

7. Repeated repudiation and breach of contracts, and lying to third parties -- Aple. App. 618-32, 1864-77, 2452-56, 2465-68.

8. Attempts to take CTR's gas without paying for it -- Aple. App. 1590-91, 1614-15, 1883-84, 1892-94, 618-32.

9. Filing sham lawsuits against third parties trying to deal with CTR -- Aple. App. 2448-49.

10. OXY's actions which pushed CTR's business to verge of collapse and infliction of its tortious misconduct on other

producers -- Aple. App. 1532, 1832, 1842, 2156-57, 2169-70, 2296-97, 2302-03, 2309, 2330, 2337-39, 2409, 2430, 2434, 2494-2500, 2533-34, 2566-70, 2611, 2623-24, 2628, 2631, 2634-43, 2650.

11. Evidence that OXY almost decimated CTR's business, put it on the verge of collapse, and shut-in its livelihood -- *see, e.g.*, Aple. App. 1614, 2156-57, 2169-75, 2215A, 2216-17.

12. OXY's admission that there were literally hundreds of producers and anywhere from 500 to 6,000 contracts which were potentially affected -- Aple. App. 2624, 2631, 2698.

13. OXY's counsel's acknowledgment of the 6,000 contracts in his Closing Argument -- Aple. App. 2698.

14. No producer could sell their gas in the free market without OXY's interference; they had to have a contract with OXY -- *see* Aple. App. 618-31, 1493A, 1830-43, 1866, 2152-53, 2408-10, 2428-35, 2499-2500, 2635; Aplt. App. 1769.

15. Statement made by OXY's corporate representative -- Aple. App. 2631.

16. Section IV - Issues To Be Raised On Appeal (Insert #2) of OXY's Docketing Statement filed on 11-2-92 in *OXY USA, Inc., Appellant v. Continental Trend Resources, Inc., Appellees*, No. 92-6350 (10 Cir.); OXY Appeal Brief, pp. 2, 12-13, 29-30; Rehearing Petition, p. 4, 15.

17. OXY's argument to District Court on what factors to apply -- OXY Brief in Support of Motion for New Trial, pp. 4-7; OXY Reply Brief, p. 5; Transcript of Hearing on New Trial, p. 6.

18. OXY argument that District Court's conclusions were wrong -- OXY Appeal Brief, p. 2; Section IV - Issues To Be Raised On Appeal (Insert #2) of OXY's Docketing Statement filed on 11-2-92 in *OXY USA, Inc., Appellant v. Continental Trend Resources, Inc., Appellees*, No. 92-6350 (10 Cir.).

19. OXY's concession of appropriate factors on rehearing -- Rehearing Petition, p. 4.

20. Issues identified by OXY as ones of exceptional importance -- Rehearing Petition, p. 15.

21. OXY concession that egregious conduct warrants huge punitive damage awards -- OXY Motion for New Trial, pp. 8-9.